No. 87-1555

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JAMES H. BURNLEY IV, SECRETARY, DEPARTMENT OF TRANSPORTATION, et al.,

Petitioners,

vs.

RAILWAY LABOR EXECUTIVES ASSOCIATION, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE CALIFORNIA EMPLOYMENT LAW COUNCIL AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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The California Employment Law Council ("CELC" or "*amicus*") submits this brief as *amicus curiae* to urge the Court to reverse the Ninth Circuit's holding that regulations of the Federal Railroad Administration mandating blood and urine testing of railroad employees involved in specified train accidents and fatal incidents, and authorizing breath and urine tests after specific accidents, incidents and rule infractions, violate the Fourth Amendment since they do not require "individualized" suspicion of drug or alcohol impairment prior to testing.[1]

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[1] Petitioners and Respondents have consented to the filing of this brief.

INTEREST OF AMICUS CURIAE

The CELC is a voluntary, nonprofit organization composed of more than 60 companies employing over 400,000 persons. Its members represent a broad segment of the employer community in California. Amicus was formed to promote the common interests of employers and the public in sound procedures and laws pertaining to employment practices.

While governmental entities such as petitioner are not members of CELC, amicus represents many private companies within industries subject to extensive governmental regulation designed to promote workplace safety. In addition, virtually all of CELC's member companies rely upon heavily regulated industries to provide safe and reliable services. Many of these companies handle and require the transport of commercial products which could endanger the public in the event of a serious accident. Moreover, numerous CELC members have embarked upon comprehensive safety programs to ensure the well-being of their employees and the public. These programs entail the prevention of substance abuse in the workplace.

In promulgating the regulations in this case, the Federal Railroad Administration ("FRA") sought to achieve safety objectives which are of great concern to CELC and its members, to wit, "to prevent accidents and casualties . . . that result from impairment of employees by alcohol or drugs." 49 CFR 219.1(a). Many CELC members, in order to assure a safe working environment, have developed substance abuse policies which, like the regulations in issue, require urine testing of employees after certain accidents, incidents and rule violations, without a showing of "individualized" suspicion. Notwithstanding that CELC members are in the private sector, and therefore are generally not subject to Fourth Amendment prohibitions,[2] the issues in this case will undoubtedly impact

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[2] *United States v. Jacobsen*, 466 U.S. 109 (1984). While the Fourth Amendment applies primarily to public sector employers, courts have (continued)

all employers.[3] Indeed, the Ninth Circuit has already applied *Burnley* to a private sector, post-accident testing program, finding its "individualized suspicion" requirement "readily applicable". *Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Company*, 838 F.2d 1087, 1093 (9th Cir. 1988).[4]

Accordingly, *amicus* has a strong interest in the outcome of this and other cases involving the contravention of drug usage in the workplace.[5] CELC believes that the Ninth Circuit's decision unjustifiably frustrates the proper regulation of employee and public safety and erroneously restricts legitimate substance abuse testing.

(ftn. continued)
applied its protections in the private sector where significant government involvement is present. *See, e.g., Blum v. Yaretsky*, 457 U.S. 991 (1982).

[3] In a real sense, the true parties in this case are *private* railroads and their employees, to whom the regulations at issue apply. Many CELC members are subject to similar regulatory supervision by various governmental agencies.

[4] A petition for review of the Ninth Circuit's decision in *Burlington Northern* was filed with the Court on April 1, 1988 (Docket no. 87-1631)

[5] CELC has filed an *amicus* brief in *National Treasury Employees Union v. von Raab*, No. 86-1879, which has been consolidated for argument with the instant case. That brief sets out more fully CELC's concerns with regard to the societal problem of drug use among employees and the resulting endangerment of personal and public safety.

FACTS AND SUMMARY OF ARGUMENT

A. Facts

After several years of rulemaking pursuant to its authority under the Federal Railroad Safety Act of 1970, the FRA promulgated regulations designed to prevent accidents, injuries and property losses due to alcohol and drug impairment of railway employees. The regulations were implemented following consideration of extensive safety data and the viewpoints of industry, labor and the general public.

It is important to emphasize that the regulations in question require railroads to conduct blood and urine testing only in *limited* situations where railroad employees are directly involved in a major train accident.[6] The regulations authorize railroads to conduct breath and urine tests where other serious accidents, incidents or rule violations have occurred or where a supervisor forms a "reasonable suspicion" that an employee is under the influence of or impaired by alcohol or drugs, based upon specific observations concerning the appearance or behavior of the employee. In addition, the regulations provide procedural safeguards for employees, including the right to disciplinary hearings and the right to insist upon blood testing for the most accurate determination of impairment.

When respondents challenged the drug testing of railway employees on constitutional and statutory grounds, the district court granted summary judgment for petitioners, finding the governmental interest in railway safety for employees and the general public paramount. The lower court noted that "objective" triggering events justify testing, and that the regulations made a "genuine attempt" to reasonably limit the scope of the

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[6] Subpart C (49 C.F.R. 219.201-213) defines a "major" accident as one which involves a fatality, the extensive release of hazardous material, or a reportable injury or damage of $50,000 or more. (49 C.F.R. 219.201, 203).

testing requirements. Finding the railroad industry to be "pervasively regulated," the court applied the standard of constitutional scrutiny for administrative searches, and found the tests reasonable in light of the government's safety concerns.

The Ninth Circuit reversed, holding that "individualized suspicion" was required before drug testing could be "justified at its inception" so as to meet Fourth Amendment requirements. The court refused to apply the administrative search standard and ruled that the tests were not "reasonably related" to improving rail safety, as they could not detect current drug intoxication or degree of impairment. The Ninth Circuit concluded that the Fourth Amendment required "observable symptoms of impairment with a positive [test] result," and not just involvement in an accident, to provide a "sound basis" for drug testing and potential disciplinary action.

B. Summary of Argument

In ruling that individualized suspicion is necessary, the Ninth Circuit rendered a decision in conflict with the reasoning of every other court of appeals which has reviewed testing in response to workplace substance abuse problems. *National Treasury Union v. von Raab*, 816 F.2d 170, (5th Cir. 1987), *cert. granted*, No. 86-1879 (Feb. 29, 1988) (customs service agents); *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987) (correctional employees); *Jones v. McKenzie*, 833 F.2d 335 (D.C. Cir. 1987) (school bus employees); *Shoemaker v. Handel*, 795 F.2d 1136 (3rd Cir.), *cert. denied*, 107 S.Ct. 577 (1986) (race jockeys); and *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976) (bus operators).[7] The Ninth Circuit's contrary position

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[7] Drug testing in the absence of individualized suspicion was upheld without evidence of workplace substance abuse problems in *von Raab* and *McDonell* in light of the serious and immediate dangers employee drug use would pose to institutional integrity and security.

rests upon its determination that the other circuits did not consider "precisely the factors we consider relevant" (*von Raab*); incorrectly reasoned that "urine testing is a lesser intrusion than body searches" (*McDonell*); adopted a "rationale [not] applicable to the employees in our case" (*Shoemaker*); and reached a decision "without very thorough analysis" (*Suscy*).

The Ninth Circuit's decision that the FRA regulations violate the Fourth Amendment is seriously flawed in its constitutional analysis. The circuit court properly stated that this Court does not require individualized suspicion as an irreducible minimum under the Fourth Amendment, yet it adopted that requirement despite the compelling facts of this case. Having found individualized suspicion to be constitutionally required, the court did not balance the competing interests which should have been considered under the Fourth Amendment's reasonableness test. The Ninth Circuit's failure to weigh factors of safety and health, which have been consistently recognized as compelling by the other circuit courts, resulted in the erroneous resolution of a critical constitutional question. In light of the railway industry's history of regulation, the diminished privacy expectations of railway employees, the minimally intrusive nature of the testing program and the lack of effective alternatives available to the FRA, the Ninth Circuit's insistence upon individualized suspicion was unwarranted.

The FRA's testing program satisfies the Fourth Amendment's reasonableness test, as it is justified at its inception and reasonably related in scope to the circumstances that gave rise to the government's concerns. The government enacted the program in response to a critical safety problem jeopardizing the lives of railway workers, passengers and the public. Adoption of the program was justified by the government's compelling concern for safety, as well as the history of intensive regulation and government involvement in the industry.

Moreover, railway employees' expectations of privacy, already diminished in the employment context, are greatly reduced where the performance of job functions implicates serious safety concerns. This diminution of privacy expectations has been consistently recognized by circuit courts where substance abuse is shown to endanger the safety of employees and the public.

The careful tailoring of the FRA program to the scope of the substance abuse problem in the railway industry further demonstrates its reasonableness. The FRA's lengthy and detailed study of substance abuse among railway employees revealed that there were no less intrusive means to control the problem. Recognizing the necessity of drug testing, the FRA developed precise guidelines incorporating extensive safeguards to minimize intrusiveness. Testing is permitted only in very narrowly defined circumstances where identification of drug usage is critical. The FRA program provides clear notice to employees who accept employment in sensitive positions, and strictly limits the exercise of discretion by railway officials through carefully designed procedural safeguards. Finally, the high professional and technical standards set forth in the regulations assure that railway employees are treated fairly and with dignity, allowing the government to preserve employee and public safety without infringing upon legitimate employee interests.

The reasonableness of the FRA's program is underscored by its moderation in comparison with comprehensive testing programs instituted by other public employers. Many would argue that the hazards posed by substance abuse in the railway industry justify random testing, and, in fact, numerous participants in the FRA-sponsored hearings advocated such testing to ensure maximum safety. In its final regulations, the FRA carefully balanced the need for safety with the interests of privacy. Finding that post-accident testing would allow identification of substance abuse in the workplace and could effectively deter abuse by employees in safety sensitive

positions, the FRA adopted a restrained and moderate approach which clearly meets constitutional requirements.

ARGUMENT

THE FEDERAL RAILWAY ADMINISTRATION'S DRUG TESTING PROGRAM SATISFIES THE FOURTH AMENDMENT'S REASONABLENESS TEST

I. PARTICULARIZED SUSPICION IS NOT CONSTITUTIONALLY REQUIRED

"The fundamental command of the Fourth Amendment is that searches and seizures be reasonable." *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985). The determination of constitutionality under the Fourth Amendment is therefore a contextual one. As this Court has stated:

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails.

Bell v. Wolfish, 441 U.S. 520, 559 (1979). In applying this reasonableness test, the Court has rejected any absolute "minimum standard" governing the constitutionality of searches in general, holding instead that "the specific content and incidents of [the individual's right to be free from unreasonable searches and seizures] must be shaped by the context in which it is asserted." *Terry v. Ohio*, 392 U.S. 1, 9 (1968).

The Fourth Amendment's flexible, context-specific analysis precludes an insistence on individualized suspicion as a constitutional minimum. This Court has expressly recognized that fact, holding that while "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure . . . the Fourth Amendment imposes no irreducible

requirement of such suspicion." *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-561 (1976).

Searches have been upheld in the absence of individualized suspicion in a number of contexts.[8] In *Martinez-Fuerte*, for example, border patrol officials operating immigration checkpoints stopped automobiles for brief questioning of their occupants. These stops were challenged as unconstitutional in light of the officials' lack of any basis for believing that any particular vehicle contained illegal aliens. The Court noted several significant factors in finding the stops constitutionally reasonable. First, the Court noted that "this practice of stopping automobiles briefly for questioning has a long history evidencing its utility and is accepted by motorists as incident to highway use." *Id.* at fn. 14. Secondly, the Court reiterated its position that "one's expectation of privacy in an automobile and of freedom in its operation are significantly different from the traditional expectation of privacy and freedom in one's own residence." *Id.* at 561. Third, the Court concluded that "the reasonableness of the procedures followed in making these checkpoint stops makes the resulting intrusion on the interests of motorists minimal." *Id.* at 562. Finally, the Court noted "the need for this enforcement technique" in light of the ineffectiveness of less intrusive alternatives. *Id.*

Each of the Court's rationales for upholding the border patrol's practices in *Martinez-Fuerte* applies with equal force to the FRA regulations presently before the Court. The FRA, in conjunction with private railways themselves, has long regulated the use of illicit drugs by railway employees. Workplace substance abuse policies date almost from the inception of the

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[8] *See, e.g., United States v. Villamonte-Marquez*, 462 U.S. 579 (1983); *Wyman v. James*, 400 U.S. 309 (1971). *See also National Treasury Union v. von Raab, supra; McDonell v. Hunter, supra; Jones v. McKenzie, supra; Shoemaker v. Handel, supra;* and *Division 241 Amalgamated Transit Union v. Suscy, supra.*

railroad industry itself.[9] Additionally, these regulations form only a small part of a far more comprehensive system of workplace regulation promoting employee and public safety in the railway industry. As Judge Alarcon's dissent to the Ninth Circuit's decision in this case illustrates, regulation has long encompassed a broad array of employee conduct.[10]

Further, consistent with *Martinez-Fuerte's* second rationale, legitimate expectations of privacy among employees in the railway industry are without doubt "significantly different from the traditional expectation of privacy and freedom in one's residence." As this Court has recognized, privacy expectations in the workplace "are far less than those found at home." *O'Connor v. Ortega*, ___ U.S. ___, 94 L.Ed.2d 714, 728 (1987). Employees' expectations of privacy may be reduced as a result of workplace "practices and procedures, or by legitimate regulation." *Id.* at 723. Extensive regulation has long existed in the railway industry, delimiting employees' legitimate privacy expectations. Those expectations are particularly circumscribed where the employee's workplace responsibilities implicate the safety of co-workers and the public.

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9 In the introduction to its Proposed Rules, the FRA noted that "the problem of alcohol use on the railroads is as old as the industry itself, and efforts to deal with it through carrier rules and enforcement began more than a century ago." 49 Fed. Reg. 24252 (June 12, 1984).

10 In response to the majority's contention that regulation of the railway industry has traditionally focused on "proper maintenance of equipment and facilities," and not on railway employees, Judge Alarcon noted legislative and administrative proscriptions governing employee conduct since 1907. Judge Alarcon commented:

> Contrary to the majority's argument, the government has a long tradition of regulating the conduct of railway personnel to promote public safety. The reason is obvious. An idle locomotive, sitting in the roundhouse, is harmless. It becomes lethal when operated negligently by persons who are under the influence of alcohol or drugs.

839 F.2d 575, 593.

As to *Martinez-Fuerte's* third rationale, the FRA regulations embody extensive procedural safeguards designed to minimize the intrusion on employee privacy interests. Testing is conducted only where life endangering events have transpired, or where reasonable suspicion is present. The regulations provide clear notice to employees who may be subject to testing, and narrowly circumscribe the exercise of managerial discretion. The regulations also specify highly accurate testing methodologies, providing the maximum scientific reliability possible, and stipulate that positive test results will be interpreted along with other available information in determining the appropriate employment decision. Each of these safeguards minimizes any intrusion upon individual privacy interests.

Lastly, the regulations at issue constitute the least intrusive means of achieving the government's purpose of eliminating undue risks to employee and public safety in the railway industry. The regulations were promulgated after several years of proceedings, during which the FRA examined the extent of the problem confronting it and considered "a wide range of options for action to address the [industry's] alcohol and drug problem." 49 Fed. Reg. 24252 (June 12, 1984). Post-accident drug testing was determined to be the least intrusive means of effectively controlling the critical problem of impairment-related railway accidents.[11]

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11 In effect, the regulations combine a number of distinct and complementary approaches carefully tailored to the various manifestations of substance abuse among railway employees. In addition to requiring testing following major train accidents, the regulations provide for breath or urine tests where a supervisor has a "reasonable suspicion" based on personal observations that an employee is under the influence or is impaired by alcohol or drugs. Testing is also sanctioned in the event of a reportable accident or incident, where a supervisor reasonably suspects that the employee's acts or omissions contributed to the occurrence or severity of the accident or incident, or in the event of certain specified rule violations. 49 C.F.R. 219.301.

The railway industry's history of regulation, railway employees' diminished expectations of privacy, the minimally intrusive nature of the FRA program and the lack of effective alternatives to drug testing in this case render the Ninth Circuit's adoption of an individualized suspicion standard erroneous. This Court's opinion in *Martinez-Fuerte* supports the conclusion that individualized suspicion is not required under the facts of this case.[12] The Court should reject the Ninth Circuit's unwarranted attempt to impose an individualized suspicion requirement on the FRA program, and should establish that insistence on such an "irreducible requirement" under the Fourth Amendment is improper in the context of a highly regulated, safety sensitive workplace.[13]

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12 The Ninth Circuit distinguished *Martinez-Fuerte* on the basis that the stops sanctioned in that case "do not approach the degree of intrusiveness involved in toxicological testing of body fluids." 839 F.2d at 586. However, the extent of the intrusion implicated by the drug testing of railway employees is just one factor to be considered along with a range of other factors under the Fourth Amendment's reasonableness test. The proper framework for consideration of those factors is discussed in Section II of this brief.

Other courts have relied on *Martinez-Fuerte*'s analysis of Fourth Amendment requirements in contexts similar to this one. For example, in *Ingersoll v. Palmer*, 241 Cal. Rptr. 42 (1987), the California Supreme Court relied extensively on *Martinez-Fuerte* in upholding the California Highway Patrol's use of traffic checkpoints to administer breathalyzer tests to motorists. The tests were administered to the driver of each fifth car passing through the checkpoint, without any individualized basis for suspecting intoxication. The court found that the breathalyzer program was justified by the state's "primary and overriding regulatory purpose of promoting public safety." Id. at 50.

13 This Court has recognized that government interests in the workplace, like those implicated by the exercise of law enforcement functions in *Martinez-Fuerte*, necessitate quick preventive action that typically cannot be achieved where individualized suspicion or probable cause requirements must be satisfied. As the Court explained in *O'Connor v. Ortega*, ___ U.S. ___, 94 L.Ed.2d 714 (1987):

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II. THE FRA'S POST-ACCIDENT DRUG TESTING PROGRAM IS CONSTITUTIONALLY REASONABLE

In *O'Connor v. Ortega*, ___ U.S. ___, 94 L.Ed.2d 714 (1987), this Court established that "public employer intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances." *Id.* at 728. Under that standard, the Court must balance "the invasion of the employees' legitimate expectations of privacy against the government's need for supervision, control and the efficient operation of the workplace." *Id.* As the Court stated:

> "Determining the reasonableness of any search involves a twofold inquiry: first, one must consider 'whether the . . . action was justified at its inception'; second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place.'"

Id. at 728-729 (citations omitted).

The FRA's post-accident testing of railway employees is constitutionally reasonable under the Court's twofold standard.

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> [While] not enforcers of the criminal law . . . public employers have a direct and overriding interest in ensuring that the work of the agency is conducted in a proper and efficient manner. In our view, therefore, a probable cause requirement for searches of the type at issue here would impose intolerable burdens on public employers. The delay in correcting the employee misconduct . . . will be translated into tangible and often irreparable damage to the agency's work, and ultimately to the public interest.

Id. at 727.

Universally recognized concerns for employee and public safety, coupled with the diminished privacy expectations of railway employees, render the FRA testing program justified at its inception. Each of the circuits that has examined drug testing programs in the context of the safety sensitive workplace has upheld such testing in light of demonstrated hazards to employee and public well being. Further, given the dimension of the safety problem that prompted implementation of the FRA program, the lack of effective alternatives to uncover employee drug usage, and the program's comprehensive safeguards and carefully tailored, minimally intrusive provisions, it is clearly justified in scope.

A. The FRA Program Was Justified At Its Inception

1. The Government's Interest In Railway Safety Is Compelling

The FRA's study of railway safety was spurred both by its specific concern over the increasing incidence of serious accidents attributable to human error in the railway industry and by its more general awareness of the societal problem of alcohol and drug abuse. With approximately one out of every six American workers between the ages of 20 and 40 smoking marijuana at least once a month,[14] the effect of substance abuse on job performance has been recognized in virtually all fields of endeavor. The U.S. Chamber of Commerce has estimated that as many as 23 percent of all U.S. workers use dangerous drugs on the job.[15] Aside from the significant impact such use has on productivity, product quality and

[14] NIDA Notes, U.S. Department of Health and Human Services, December 1986 at 3.

[15] M. de Bernardo, *Drug Abuse in the Workplace: An Employer's Guide*, at 12 (1987).

workplace morale, serious safety risks resulting from workplace impairment are inevitable.

The FRA's exhaustive survey of railway injuries and safety hazards confirmed the broad impact of drug and alcohol abuse on the railway industry. The FRA found that substance abuse played a causal or contributory role in at least 10 accidents during the 13 month period ending January 31, 1988, resulting in a total of 18 deaths, 220 injuries, and over $18 million in property damage.[16] The most tragic accident occurred on January 4, 1987 near Chase, Maryland. That accident involved the collision of an Amtrak passenger train with three Conrail freight locomotives, resulting in 16 deaths and 174 injuries. The National Transportation Safety Board recently determined that the accident was attributable to the Conrail engineer's marijuana impairment. The engineer and front brakeman tested positive for marijuana usage, and both have subsequently admitted to having smoked marijuana prior to the accident.[17]

In an industry in which roughly one third of all accidents result from human error,[18] in which the potential for destruction encompasses enormous property losses and public hazards such as toxic spills, and in which the lives of employees and the public are always in potential jeopardy, the government bears a weighty responsibility to assure safe operations. The use of drugs and alcohol by employees occupying safety sensitive positions is incompatible with that responsibility. "As recent history attests, locomotives in the hands of drug or alcohol-impaired employees are the substantial equivalents of time-bombs endangering the lives of thousands."[19] Given the extensive substance abuse problem in the railway industry, the FRA was clearly justified in instituting its drug testing

[16] 53 Fed. Reg. 16641 (May 10, 1988).

[17] *Id.*

[18] 49 Fed. Reg. 24294 (June 12, 1984).

[19] 839 F.2d at 596 (Alarcon, J. dissenting.)

program, having "reasonable grounds for suspecting that the search [would] turn up evidence" of dangerous substance abuse among railway employees. *New Jersey v. TLO*, 469 U.S. 325, 342 (1985). The government's interest in identifying and controlling drug usage by railway employees in safety sensitive positions is compelling and justifies the FRA's post-accident testing program.[20]

2. Railway Employees' Expectations of Privacy Are Limited By The Employment Relationship

A critical factor in assessing the reasonableness of a search under the Fourth Amendment is the context in which the search occurs. As common sense dictates and this Court has recognized, an individual's reasonable expectations of privacy are necessarily diminished in the context of the employment relationship.[21] Thus, for example, employers, including the government, may require employees as well as applicants for employment to undergo detailed physical examinations to determine fitness for employment. While such examinations

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[20] The Sixth Circuit recently emphasized the importance of collecting and assessing evidence of substance abuse prior to instituting drug testing programs. In *Lovvorn v. City of Chattanooga*, 846 F.2d 1539 (1988) and *Penny v. Kennedy*, 846 F.2d 1563 (1988), the court rejected programs calling for mandatory drug testing of all firefighters and police officers "because there was not any evidence of a widespread or significant drug problem" in either department. The court found that "the potential gains to society of initiating mandatory drug testing are significantly lower than would have been the case if there had been evidence of a systematic drug problem." The FRA's detailed compilation and consideration of the serious and pervasive substance abuse problem among railway workers clearly satisfies the Sixth Circuit's standard.

[21] *See, e.g., Connick v. Meyers*, 461 U.S. 138, 147 (1983); *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980).

might well intrude upon expectations of privacy where no special relationship exists between the government and the individual, they are universally accepted as within the government's prerogative in its capacity as employer.

In *O'Connor v. Ortega*, ___ U.S. ___, 94 L.Ed.2d 714, 723, (1987) this Court stated that, while individuals do not completely sacrifice their rights under the Fourth Amendment when they undertake to work for the government, "operational realities of the workplace . . . may make some employees' expectations of privacy unreasonable." Thus "the privacy interests of government employees in their place of work . . . while not insubstantial, are far less than those found at home or in some other contexts." *Id.* at 728. The basis for this diminution of privacy rights in *O'Connor* was the public employer's "direct and overriding interest in ensuring that the work of the agency is conducted in a proper and efficient manner." *Id.* at 727. Here the government's interest in operational efficiency is coupled with paramount concerns for employee and public safety. Clearly, an individual electing to work in a position implicating such preeminent safety concerns must reasonably be prepared to sacrifice privacy interests cognizable in other contexts.[22]

The safety concerns delimiting the privacy interests of employees in the railway industry are compelling. An individual seeking employment in that industry is confronted not only with the recent history of drug and alcohol related catastrophes, but with the long-established, virtually all-encompassing regulation of railway practices and personnel.[23] In under-

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[22] The Sixth Circuit in *Lovvorn v. City of Chattanooga, supra* at fn. 20, succinctly articulated this observation, stating that "if the potential harm to society of an impaired public employee is likely to be very large, society will be less willing to consider reasonable that employee's subjective expectations of privacy."

[23] The government's comprehensive regulation of the railway industry formed the basis for the district court's finding that the FRA regulations were constitutionally permissible under the pervasively regulated industry standard. In balancing the competing interests of

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taking work in a train crew, that individual accepts the responsibility for affirmatively safeguarding the lives of fellow crew members, passengers and the public.[24]

3. Other Circuits Have Found Such Testing to Be Reasonable In Light of Compelling Safety Concerns

In finding that the FRA's drug testing program was not a reasonable response to demonstrated substance abuse problems,

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the government and employees in the railway industry, the district court emphasized that "the railroad industry is one of the most extensively regulated industries that we have in interstate commerce [and] the regulation extends not just to the railroads themselves, but [includes] a certain amount of regulation of the employees." Regardless of whether this Court applies the Fourth Amendment standard for "pervasively regulated industries," the history and extent of government regulation of employee conduct in the railway industry significantly impacts the reasonableness of the FRA's testing program. The extensive regulation of the railways not only manifests the weight of the government's concern for employee and public safety; it simultaneously provides notice to individuals who choose to work in the industry that various practices which might be considered private in the home may become the focus of government interest and investigation in the context of government employment. *Cf.*, *Shoemaker v. Handel*, 795 F.2d 1136, 1142 (3d Cir. 1986), noting that "when jockeys chose to become involved in this pervasively-regulated business . . . they did so with the knowledge that the Commission would exercise its authority to assure public confidence in the integrity of the industry."

[24] The Ninth Circuit has recognized that notice of testing limits employees' reasonable expectations of privacy. In *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328 (9th Cir. 1987), the court found that an employee "would enjoy a reasonable expectation of privacy . . . unless he was on notice from his employer that searches of the type to which he was subjected might occur from time to time for work-related purposes." Id. at 1335.

the Ninth Circuit strayed from the holdings of every other circuit court which has addressed the issue of drug testing in safety sensitive industries. The Ninth Circuit properly stated that determining the reasonableness of such a program "requires 'balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interest against the importance of the governmental interests alleged to justify the intrusion.' " However, in applying that standard, the circuit court "failed to engage in the balancing of interests required by the Supreme Court." 839 F.2d 575, 597, Alarcon, J. dissenting.

All three circuit courts that reviewed drug screening in safety-sensitive industries prior to *Burnley* upheld the testing in light of compelling safety concerns. In *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976), the Seventh Circuit addressed the constitutionality of a drug testing program in a factual setting similar to this case. *Suscy* involved rules of the Chicago Transit Authority requiring urine and blood testing for alcohol or drug usage of operating employees immediately following a serious accident. In arguing that the rules were reasonable, the Transit Authority relied on the obvious threat employee intoxication posed to the safety of mass transit riders. In light of this argument, the Seventh Circuit found the employees' Fourth Amendment rights outweighed by the employer's "*paramount interest in protecting the public* by insuring that bus and train operators are fit to perform their jobs." *Id.* at 1267 (emphasis supplied).

In *Jones v. McKenzie*, 833 F.2d 335 (D.C. Cir. 1987), the District of Columbia instituted a program involving the routine drug testing of school transportation employees. That action was taken pursuant to the District's identification of "a veritable 'drug culture' among Transportation Branch employees." *Id.* at 40. The tests, administered as part of the employees' periodic physical examinations, were required of all

bus drivers, mechanics, and bus attendants.[25] In evaluating the constitutionality of the program, the circuit court balanced the intrusion on Fourth Amendment privacy interests against the government interest involved. The court acknowledged that "strong privacy interests" were implicated by the testing program, but noted the existence of "*serious* safety concerns on the other side of the balance." *Id.* at 340 (emphasis in original). In reconciling these interests, the court stated that "a governmental concern *is particularly compelling when it involves the physical safety of the employees themselves or others*." *Id.* (emphasis supplied). Given the existence of such a compelling interest in physical safety, the circuit court held the testing program to be reasonable, and thus constitutional.

Finally, the Eighth Circuit upheld drug testing of prison employees in *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987). In *McDonell*, the Iowa Department of Corrections adopted policies requiring correctional employees to submit to urine tests upon the request of Department officials. The court, while finding that such testing plainly implicated the employees' Fourth Amendment rights, upheld the drug screening "in light of the difficult burdens of maintaining safety, order and security that our society imposes on those who staff our prisons." *Id.* at 1306. In so holding, the Eighth Circuit recognized that "the institutional interest in prison security is a central one," and that "the only way [the use of drugs by employees] can be controlled in a satisfactory manner is to permit . . . testing." *Id.* at 1308.

In contrast to these decisions, the Ninth Circuit in *Burnley* focused "solely on the degree of impairment of the workers'

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[25] The district court upheld the testing program as to bus drivers and mechanics, but found it unconstitutional as to bus attendants, who were not "directly responsible for the operation and maintenance of school buses." 628 F.Supp. 1500, 1508. The circuit court's decision rejected that distinction, finding the lesser safety concerns implicated in the performance of the attendants' jobs "still quite significant." 833 F.2d 335, 340.

privacy interests," completely circumventing any discussion of the government's legitimate and compelling concern for public safety. 839 F.2d 575, 597 (Alarcon, J. dissenting). Yet it is the weight of that concern, when balanced against the individual's privacy interest, that justifies the testing. The FRA regulations were promulgated in response to a serious problem involving alcohol and drug abuse in the railroad industry. As is the case in a wide range of industries, employee use of drugs and alcohol poses a serious hazard to the safety of co-workers and the general public. That fact was recognized by each of the other circuits to address this issue, as well as by the district court and the Railway Labor Executives' Association in this case.[26] Thus, the majority's analysis in *Burnley* is contrary to the holdings in *Suscy*, *Jones*, and *McDonell*. The Ninth Circuit's decision reflects that court's de facto abandonment of the balancing test mandated under the Fourth Amendment, and should be reversed.[27]

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[26] The district court found that testing served the government's interest in "railway safety, safety for employees, and safety for the general public." The RLEA concedes that substance abuse poses a serious threat to the safe operation of the nation's rail systems.

[27] The FRA's restrained approach to the serious problem of substance abuse in the railway industry compares favorably with the programs adopted by the governmental entities in *Suscy*, *Jones* and *McDonell*. In contrast to the Transit Authority's adoption of post-accident testing in *Suscy*, the FRA's promulgation of the regulations in this case followed detailed documentation and review of the problem of substance abuse among railway employees. The FRA's careful consideration of extensive data buttressed its conclusion that post-accident testing was a necessary component of an effective testing program. Further, while periodic testing was found reasonable in *Jones* and random testing was upheld in *McDonell*, the FRA regulations mandate testing *only* following major train accidents and fatal incidents. Surely, this restrained approach is reasonable given the compelling safety interests involved in the railway industry.

B. The FRA Program Is Reasonably Related In Scope To The Railway Industry's Safety Concerns

1. Post-Accident Testing Is The Least Intrusive Means of Identifying Dangerous Substance Abuse Among Railway Employees

The Ninth Circuit's rejection of the FRA drug testing program was premised on the court's conclusion that limiting testing to cases where individualized suspicion could be shown "poses no insuperable burden on the government." However, as each of the circuit courts that has addressed the issue of workplace drug testing has found, requiring individualized suspicion prior to testing effectively precludes the timely discovery of hazard-causing substance abuse.

The regulations at issue represent the FRA's reasoned attempt, supported by years of analysis and debate, to responsibly address the problem of drug usage in the workplace. Prior to the adoption of the FRA regulations, employers in the railway industry, like most other employers, relied on the observations of supervisors for identification of workplace impairment. The FRA's study of employee drug and alcohol usage in the industry revealed serious obstacles to the detection of workplace impairment through such informal observatory techniques.

The principle obstacle is the absence, in many instances, of observable symptomatology. The FRA's study found that many workers whose impairment posed legitimate safety risks to themselves and others manifested no easily detectable signs of impairment. This was found to be true of employees imbibing low to moderate amounts of alcohol adequate to substantially affect "choice reaction time" critical to the safe operation of

railroad vehicles.[28] Moreover, the FRA found that alcoholics and other habituated drinkers "may be able to achieve elevated [blood alcohol content levels] (even in excess of .30 percent) without showing outward signs that would be evident to a person with limited training."[29] In fact, no level of training was found to provide an adequate guarantee of detection in critical situations.[30] Finally, the FRA found detection of drug-related impairment to be virtually impossible in many instances, due to the fact that many drugs "produce effects much more subtle or complex (and sometimes more pernicious) than alcohol."[31]

Two further problems render observation by supervisors an inadequate and undesirable alternative to drug testing. First, employees in the railway industry often work largely or entirely

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[28] 50 Fed. Reg. 31,508, 31,536 (August 2, 1985).

[29] 50 Fed. Reg. 31,526.

[30] The FRA noted that studies of bartenders and even police officers had shown significant inabilities to identify levels of alcohol-related impairment. 50 Fed. Reg. 31,526.

[31] 50 Fed. Reg. 31,527. The difficulty of detecting drug-related impairment has been noted by numerous courts and authorities. As the Eighth Circuit recently stated:

> [T]he use or abuse of marijuana and other illegal drugs frequently does not produce an externally obvious state of impairment. The intoxicating effect of these substances is said to be primarily mental or emotional; *a user's judgment or clear-headedness may be impaired without any obvious physical sign of intoxication.* It is the *insidious nature of these substances* that too often the user's faculties are impaired and the damage done through a serious error on his part before he realizes that he is impaired and without any outward sign of his impairment that could lead a supervisor or other person to intervene.

Brotherhood of Maintenance of Way Employees v. Burlington Northern Railroad Co., 802 F.2d 1016, 1020 (8th Cir. 1986) (emphasis supplied).

in isolation from others and thus are not subject to frequent supervisory observation. In these instances occasional supervisory checks provide an inadequate safeguard against impairment and actual on-the-job drug use. This problem was attested to by the engineer responsible for the Amtrak accident on January 4, 1987. In a tragically honest statement before Congress, he stated:

> Use of the reasonable suspicion standard would not have detected any problem with my behavior on January 4, 1967. I had not ingested any alcohol or drugs prior to reporting for work that morning. Detection can be circumvented by drinking or doing drugs while on the engine. Sometimes crews stop the engines to purchase beer and consume it on the engine.

Secondly, even where supervisors are routinely present and are trained to detect symptoms of drug and alcohol use and impairment, efforts at detection can be highly intrusive. Given the lack of easily identifiable symptoms, adequate efforts at detection of impairment necessarily involve close scrutiny of behavioral patterns and probing questioning of employees suspected of drug use. Moreover, a high degree of individual discretion is implicated, a factor often found to render searches unreasonable. Sensitive of these problems and the potentially severe disciplinary consequences for reported employees, supervisors are reluctant to accept the responsibility for identifying impairment where the employee's symptoms of drug or alcohol usage are not obvious. The FRA regulations recognize these concerns in their multi-pronged approach to identifying drug and alcohol usage, and represent a balanced, reasonable and moderate attempt to address that problem.

2. FRA Testing Safeguards Assure Minimal Intrusion Upon Employees' Privacy Expectations

The careful design and expansive safeguards embodied in the FRA's testing procedures undercut any claim of unwarranted intrusiveness. The scope of the testing program is narrowly tailored to respect employees' reasonable expectations of privacy. As noted above, testing is required only where reasonable suspicion exists or where the employee is involved in a specified accident, incident or rule violation. Employees who exhibit no overt signs of impairment and do not occupy safety sensitive positions are not required to submit to testing. Employees in sensitive positions are required to submit to testing only where a safety hazard has occurred, and even then need not undergo testing if it can be "immediately determine[d], on the basis of specific information, that the employee had no role in the cause(s) of the accident/incident." 49 C.F.R. 219.203(a)(3)(i). Thus the scope of the employee group required to submit to testing is narrowly defined.

The manner in which testing is performed further minimizes the program's intrusiveness. First, the clear language of the FRA regulations provides notice to employees that they will be subject to post-accident testing should they undertake to work in safety-sensitive positions. This notice effectively forecloses any possibility of an "unsettling show of authority" indicative of unexpected intrusions upon privacy. *Delaware v. Prouse*, 440 U.S. 648, 657 (1979). Secondly, the FRA's precise guidelines as to when employees must undergo testing provide safeguards and strictly limit the discretion of railroad officials. Such strict limits on discretion render testing consistent and predictable for railway employees.[32] Lastly, the highly

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[32] Official discretion has consistently been recognized as presenting a threat of unreasonable invasion of privacy, thus necessitating the availability of other safeguards. *Delaware v. Prouse*, *supra*, at 655.

professional and technically advanced testing methodology contemplated by the regulations assures that test results provide accurate and useful information to the railroad employer.[33] Under the regulations, testing is conducted at independent medical facilities by qualified medical personnel. Samples are retained for no less than six months, and reliable confirmatory tests are required where the initial test is positive for a substance other than alcohol.[34] 49 C.F.R. 219.307(b). Further, where testing is conducted in anticipation of disciplinary proceedings, the employee is afforded an opportunity to provide a blood sample to ensure accurate findings. Clearly, the FRA regulations' extensive safeguards assure that the government's attempts to identify and control critical substance abuse problems do not intrude upon reasonable privacy interests of railway employees.

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33 The Ninth Circuit concluded that testing was not "reasonably related" to railway safety since tests by themselves cannot conclusively establish current impairment. However, the FRA testing guidelines provide that the results of drug tests be considered along with other relevant data in making the ultimate determination of impairment. In fact, the notice to employees concerning testing recognizes that blood tests only provide information "pertinent to current impairment."

34 The testing procedures under the FRA program are substantially similar to those of the Customs Service program in *von Raab*, discussed in CELC's *amicus* brief in that case. The accuracy of those procedures is examined in detail in the *amicus* brief filed on behalf of PharChem Laboratories and the Syva Company in that matter.

CONCLUSION

The Federal Railway Administration's drug testing guidelines constitute a moderate, appropriate and constitutionally permissible response to the compelling problem of substance abuse in the railway industry. For that reason and each of the reasons stated above, the decision of the court of appeals should be reversed.

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Respectfully submitted,

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